

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LESLIE L. REA

Claimant

VS.

MURRAY CASING CREWS, INC.

Respondent

AND

AMERICAN INSURANCE COMPANY

Insurance Carrier

Docket Nos. 1,051,224 and
1,051,225

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 17, 2012, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on January 9, 2013. Scott J. Mann, of Hutchinson, Kansas, appeared for claimant. Dallas R. Rakestraw, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

In Docket No. 1,051,224, the Administrative Law Judge (ALJ) found claimant had a 15 percent permanent partial impairment to his left upper extremity at the level of the shoulder. In Docket No. 1,051,225, the ALJ found claimant had a 12.5 percent permanent partial impairment to his right upper extremity at the level of the shoulder. Further, the ALJ found claimant was entitled to penalty interest at the rate of \$.90 per day from May 23, 2012, and continuing until a minimum Award of \$6,880.12 has been paid.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant requests review of the ALJ's findings regarding the nature and extent of his disability. Claimant contends he suffered impairment to his cervical spine as a result of the June 17, 2009, accident and argues he is entitled to an impairment to the body as a whole. Claimant also asserts he is eligible for a work disability. Claimant also argues respondent's failure to pay permanent partial disability benefits prior to the Award without just cause or excuse entitles him to an interest penalty.

Respondent asks that the Award be affirmed relative to the nature and extent of claimant's disability, arguing claimant is not entitled to an impairment to the body as a whole because any cervical impairment he might have is preexisting. Respondent argues the ALJ erred in finding it owed claimant an interest penalty for its failure to pay the minimum payment prior to the Award.

The issues for the Board's review are:

(1) What is the nature and extent of claimant's disability?

(2) Is claimant entitled to an interest penalty based on respondent's failure to pay the minimum payment of compensation due prior to the Award without just cause?

FINDINGS OF FACT

Claimant began working for respondent as a field hand in December 2007. After about three months, he was promoted to operator. An operator gives the field hands orders, runs the tongs and screws pipe together. Claimant also worked in the shop, changing oil in the trucks, cleaning trucks, and repairing equipment.

On June 17, 2009, claimant and his crew were laying down drill pipe using a cat line. Claimant was holding a cat line with his left hand when the derrick hand who was running the cat head jerked on the line hard, jerking claimant off the floor. Claimant was pulled up off the floor about a foot. His head went back, his hard hat fell off, and he felt his shoulder pop. Claimant felt pain in his neck and left shoulder.¹ He continued to work his shift, and he reported the accident when he returned to the shop that day. Although claimant eventually sought medical treatment, he did not think he was taken off work before suffering a second accident.

On December 20, 2009, claimant was working in the shop changing the oil on a work truck. He reached over his head with his right arm to grab a wrench, and his right shoulder locked up and he heard a popping sound. Claimant felt intense pain, which he described as burning, crushing and stabbing. Claimant rested and let the pain subside, then he finished his job and went home.²

At the regular hearing on January 19, 2012, claimant testified his neck was sore all the time. When claimant walked, he experienced a burning pain across the upper back into the shoulders and shoulder blades, which worsened if he was holding something out in front of his chest. The muscles in the base of his skull tightened up and he got

¹ This claim is Docket No. 1,051,224.

² This claim is Docket No. 1,051,225.

headaches. Claimant's left shoulder was sore all the time, and he got shooting pains down to the elbow. He could not raise his left arm more than 45 degrees to the side and could not get it over his head without pain. Claimant's right shoulder popped and cracked when he moved it, and it was sore all the time. He could not raise the right arm over 45 degrees to his side or over his head without pain shooting into the elbow from his shoulder. Overhead work was impossible.

Claimant testified he had never suffered a previous injury to either shoulder and never had a neck or back problem before. He said the only previous problem he had with his neck was stiffness. He never had previous permanent restrictions. Claimant said he has arthritis in his right knee and probably has arthritis in his shoulders.

Claimant was in a motorcycle accident in 1975, in which he suffered a concussion and a broken collar bone. Claimant was also in a car accident in 1989, in which he injured his right knee. He was seen in the emergency room but was not hospitalized. He did not follow up with a doctor for the injuries from the 1989 car accident. In April 2008, claimant was being treated by Dr. Randall Hildebrand for knee pain, and his right knee was "scoped."

Some of claimant's medical records from before his work related accidents were stipulated into the record. On November 28, 2007, claimant saw Bill Luebbers, R.P.A.-C, a physician assistant in Dr. Cameron Knackstedt's office. Claimant was complaining of problems with pain and said he had chronic pain in his neck due to a motor vehicle accident in 1999.³ Claimant had been treated at a pain management clinic in Dallas, Texas, before he moved to Kansas. Claimant also complained to Mr. Luebbers of headaches, bilateral knee and right hip pain, and bilateral carpal tunnel syndrome. He had decreased range of motion of the neck due to pain. Claimant was diagnosed by Mr. Luebbers with chronic pain and prescribed Lortab and Fioricet.

On May 28, 2008, claimant was seen in Dr. Hildebrand's office with a chief complaint of neck and back pain and as a follow-up on his knee scope. Claimant said he had persistent pain in his lower back and neck since a car accident in 1990 and has had off and on treatment. Claimant also said his neck pain was mainly on the right side in the musculature. The pain radiated up to the base of the skull and gave him a tension-type headache. Claimant had tenderness along the posterior musculature along the right side of his neck. He had good flexion and extension of his neck, but lacked right bend and right rotation. A cervical MRI was done on May 30, 2008, which showed a mild posterior bony ridging and disc bulge at C5-6 which flattened the anterior thecal sac. Mild left-sided neural foraminal narrowing was also noted at C5-6 from facet and uncovertebral joint hypertrophic change.

³ Dr. Hildebrand's record of May 28, 2008, indicated claimant said the motor vehicle accident occurred in 1990. Claimant testified he was involved in the motor vehicle accident in 1989.

Dr. Hildebrand's medical note of June 2, 2008, showed claimant had more significant cervical spine degenerative posttraumatic changes than changes in the lumbar spine. Claimant was to be evaluated for consideration of a lumbar epidural injection or possible SI joint injection. Dr. Hildebrand's medical note also set out, "Unfortunately I do not think it is possible to resolve all of his pain."⁴

On October 17, 2008, claimant saw Dr. John Fan, complaining of increased neck pain, right-sided low back pain, hip pain and knee pain. Claimant said overall his pain was getting worse. He was taking OxyContin 20 mg. every eight hours. Dr. Fan prescribed Percocet 10, up to three pills a day. Claimant returned to Dr. Fan on November 12, 2008, for follow-up on his chronic neck and back pain. Claimant reported his pain was under control with Percocet 10. He was taking up to four pills a day.

Claimant saw Dr. Fan again on February 13, 2009, for chronic neck and low back pain. Claimant's pain was fairly stable with current Percocet use. Physical examination of the cervical and lumbar spine showed no tenderness to palpation and range of motion was fairly within normal limits. On March 30, 2009, claimant saw Dr. Fan for his chronic neck and low back pain. Claimant's pain was stable with the use of Percocet and OxyContin. On May 22, 2009, claimant returned for follow-up of chronic neck, back and hip pain. Claimant said he had been doing heavy physical work on a daily basis, and his pain was stable with use of Lortab 10 and OxyContin.

After claimant's accidents in June and December 2009, claimant sought treatment from Dr. Ann Taylor, his family physician, and Drs. Hildebrand and Fan. Throughout this time, claimant also had physical therapy. He continued to work, performing the same job tasks as before his accidents, and he was being paid the same wages. Claimant said he continued to perform his regular work until Dr. Hildebrand took him off work in April 2010. Other than a few days claimant worked for his father-in-law weatherizing a house, earning \$200, he has not performed any work for wages since he was taken off work at respondent.

Dr. Paul Stein, a board certified neurosurgeon, first saw claimant for an independent medical evaluation on August 30, 2010, at the request of respondent. Claimant's chief complaints were neck and bilateral shoulder symptomatology. Dr. Stein had no medical records covering any treatment claimant had received before July 2009.

In regard to claimant's cervical spine, Dr. Stein stated claimant had considerable degenerative changes over three levels. Claimant's symptomatology and physical examination were consistent with degenerative disc disease. Dr. Stein did not think claimant was a good surgical candidate. Dr. Stein ordered a bilateral shoulder MR arthrogram. Those tests revealed claimant had some small rotator cuff tears and some

⁴ Stipulation of Medical Records at 5 (filed Apr. 2, 2012).

joint degeneration. Dr. Stein recommended an orthopedic referral, and claimant was referred to Dr. Brennen Lucas.

On July 15, 2011, after claimant had been treated by Dr. Lucas, Dr. Stein examined claimant for the purpose of providing an impairment rating. Dr. Stein still did not have claimant's medical records from before his accidents, and Dr. Stein was only addressing functional impairment pertaining to the cervical spine. Dr. Stein placed claimant in the *AMA Guides*⁵ DRE Cervicothoracic Category II with an assigned 5 percent whole body impairment. Dr. Stein recommended claimant have permanent work restrictions of no overhead activity and that he avoid frequent bending and twisting of the neck.

On September 27, 2011, Dr. Stein performed another evaluation of claimant for the purpose of addressing his functional impairment for his bilateral shoulders. This evaluation was done at the request of claimant's attorney. Using the *AMA Guides*, Dr. Stein rated claimant as having an 8 percent permanent partial impairment to the right upper extremity and 20 percent impairment to the left upper extremity. He recommended claimant have the following permanent work restrictions relating to his shoulders: no activity with either hand above shoulder level or more than 24 inches from the body, no lifting more than 20 pounds with either hand and only up to chest level, and no frequent repetitive lifting with either hand.

Later, Dr. Stein performed a record review, at the request of respondent, reviewing some medical records covering treatment claimant received before his work injuries. Dr. Stein's report on this review was dated February 8, 2012. After reviewing claimant's previous medical records, Dr. Stein concluded claimant had a substantial preexisting and ongoing problem with his neck. Dr. Stein, therefore, opined that claimant had no impairment to the cervical spine from the work accidents because he had already been in the *AMA Guides* Category II impairment level, and he could not document any additional damage. Relative to the restrictions Dr. Stein earlier placed on claimant, he did not believe there was any evidence claimant had any additional injury to the cervical spine adequate to require restrictions that claimant would not have had before his work injuries. Dr. Stein acknowledged that as far as he knew, claimant had no permanent restrictions before his June 2009 injury.

Dr. Stein did not believe claimant's previous cervical condition was aggravated, accelerated or intensified by the June 2009 accident. Dr. Stein said claimant may have had more pain afterward, but he could not measure or document claimant's complaints of pain. There was no documentation that there had been a structural change in claimant's neck, so there was no objective basis to say he had any additional injury.

⁵ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. John Estivo, a board certified orthopedic surgeon, examined claimant on January 27, 2012, at the request of respondent. Claimant gave Dr. Estivo a history of his two work-related accidents and his medical history. Dr. Estivo's review of claimant's medical records revealed claimant had a history of degenerative disc disease to the cervical spine that had been ongoing before June 2009. Claimant had been treated with narcotics for pain management for chronic pain in the cervical spine, bilateral hands, bilateral knees, right hip and lumbar spine prior to the June 2009 accident. Claimant told Dr. Estivo he had been in a motor vehicle accident in 1989 in which he injured his right knee and also that he had a work-related injury in 1993 in which he also injured his right knee. Claimant said he had been seeing Dr. Fan for chronic pain management for six years. Claimant also admitted he saw Dr. Hildebrand for neck pain while he was being treated for knee pain.

Dr. Estivo reviewed an MRI of claimant's cervical spine completed on October 21, 2009, which revealed age-related degenerative disc disease at C4-5, C5-6 and C6-7, as well as degenerative bulging at all three levels. No acute abnormalities were seen. X-rays of claimant's cervical spine revealed age-related degenerative changes. An MR arthrogram of the right and left shoulders completed on September 15, 2010, revealed a full thickness rotator tear to both shoulders as well as degenerative changes to both shoulders. Dr. Estivo's office took x-rays of claimant's shoulders, which revealed evidence of prior surgeries to each shoulder but no other abnormalities.

Dr. Estivo diagnosed claimant with status post left shoulder arthroscopy with rotator cuff repair; status post right shoulder arthroscopy with rotator cuff repair; and preexisting chronic cervical spine pain with degenerative disc disease. He believed both claimant's shoulder injuries were related to his work injury claims but did not believe the cervical spine complaints were related to his injury claims because claimant had an extensive preexisting history of chronic cervical spine pain. Dr. Estivo noted claimant had been on strong narcotics for a number of years for chronic cervical pain. Dr. Estivo did not find claimant had any restrictions for his neck before the June 17, 2009, injury.

Based on the *AMA Guides*, Dr. Estivo rated claimant as having a 17 percent impairment to his left upper extremity and a 7 percent impairment to the right upper extremity. He did not assign any impairment to claimant's cervical spine as a result of the June 17, 2009, and December 20, 2009, accidents. Dr. Estivo said claimant's preexisting neck condition would have placed him in DRE Category II for a 5 percent impairment. The next DRE category would have been for radiculopathy, and there was no evidence that claimant was suffering from cervical radiculopathy at the time Dr. Estivo saw him. Dr. Estivo acknowledged claimant could have aggravated his preexisting cervical condition in the June 17, 2009, accident, but he believed the functional impairment in claimant's cervical spine remained unchanged from before his accidents.

Dr. Estivo recommended claimant not perform over-the-shoulder-height work. He reviewed a task list prepared by Steve Benjamin.⁶ Of the 33 unduplicated tasks on the list, Dr. Estivo opined that claimant was unable to perform 14 for a 42.4 percent task loss.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on April 6, 2012, at the request of claimant's attorney. Claimant told Dr. Prostic he had been in a motor vehicle accident years ago and had episodic pain in his neck and back. An MRI of claimant's cervical spine taken May 30, 2008, showed mild posterior bony ridges at C5-6. Claimant told Dr. Prostic his current complaints were pain at the back of his neck with burning to either side going to the tops of his shoulders. He had increased difficulty looking up. At times, he had numbness in his left hand. His neck pain worsened with pushing, pulling and inclement weather. Claimant had pain about both shoulders. He had difficulty sleeping on the right shoulder. His shoulders worsen with activities, especially over the shoulder.

Dr. Prostic opined that on June 17, 2009, claimant sustained injury to his neck and left shoulder. He had rotator cuff repair on his left with excision of the lateral clavicle. Dr. Prostic also opined that as a result of the June 17, 2009, accident, claimant aggravated preexisting degenerative disc disease in his cervical spine. He rated claimant as having a 10 percent disability to the whole body for the cervical spine and an 18 percent disability to the left upper extremity, for a combined impairment of 20 percent of the whole body. Dr. Prostic said his cervical spine impairment rating was based upon the Range of Motion Model and opined that approximately one-half of claimant's cervical impairment preexisted his accident of June 17, 2009.

As a result of the December 20, 2009, injury, Dr. Prostic noted claimant required two operations to his right shoulder. He opined claimant is developing post-traumatic osteoarthritis. He rated claimant's permanent partial impairment as being 30 percent of the right upper extremity. Dr. Prostic said claimant should continue under Dr. Lucas' work restrictions and also should avoid any activities above shoulder height or use of vibrating equipment. All Dr. Prostic's ratings are based on the *AMA Guides*.

Dr. Brennen Lucas issued an impairment rating for claimant on December 4, 2011, which was stipulated by the parties as being part of the record. Claimant had been under the care of Dr. Lucas for his right and left shoulders since November 15, 2010. Dr. Lucas released claimant from treatment as being at maximum medical improvement on September 23, 2011. Dr. Lucas said claimant had a functional capacity evaluation which showed he still had significant limitations due to pain and actual range of motion limitations and weakness.

⁶ Steve Benjamin, a vocational rehabilitation consultant, interviewed claimant on February 9, 2012, at the request of respondent. He prepared a list of 33 tasks claimant had performed in the 15-year period before his accident.

Based on the AMA *Guides*, Dr. Lucas rated claimant as having a 3 percent impairment of his bilateral shoulders due to loss of flexion as well as a 2 percent impairment of the bilateral upper extremities due to loss of internal rotation, making his impairment rating 5 percent for each upper extremity. This combines for a 10 percent impairment to the upper extremities and converts to a whole person impairment of 6 percent. Dr. Lucas restricted claimant's lifting to 35 pounds occasionally, 18 pounds frequently, and 7 pounds constantly. Dr. Lucas restricted claimant's carrying to 25 pounds occasionally, 13 pounds frequently, and 5 pounds constantly. Claimant should not push more than 30 pounds, nor should he pull more than 22 pounds.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁷ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁸ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.⁹

K.S.A. 44-510d(a) states:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly

⁷ *Odell v. Unified School District No. 259*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁸ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

⁹ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

...
(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

...
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-512a states in part:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation in an amount of not more than \$100 per week for each week any disability compensation is past due

and in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within 20 days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a), if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand. The employee may maintain an action in the district court of the county where the cause of action arose for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section and reasonable attorney fees incurred in connection with the action.

K.S.A. 44-512b(a) states:

(a) Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

ANALYSIS

Docket No. 1,051,224

Claimant alleges injury to his neck and left shoulder arising out of an accidental injury occurring on June 17, 2009.

1. Neck Injury

The record contains an extensive amount of medical evidence supporting a finding that claimant's neck problems preexisted his work injury.

Claimant saw Dr. Knackstedt's physician's assistant, Bill Luebbers, on November 28, 2007, for complaints of neck pain and a headache. Claimant gave a history of chronic neck pain due to a 1999 motor vehicle accident. The records reflect that claimant was suffering a stress type headache stemming from his neck injury.

On May 28, 2008, claimant was seen in Dr. Hildebrand's office with a chief complaint of neck and back pain and a follow-up on his knee scope. Claimant said he has had persistent pain in his lower back and neck since a car accident in 1990, with off and on treatment. He was seen by a pain management specialist in Texas. Claimant described his neck pain as mainly on the right side with pain radiating up to the base of the skull, causing a tension-type headache.

Dr. Hildebrand ordered an MRI which showed spinal stenosis at C4-5 and a mild posterior bony ridging, and a disc bulge at C5-6 which flattened the anterior thecal sac. Claimant had tenderness along the posterior musculature along the right side of his neck. Dr. Hildebrand reviewed the MRI and wrote the claimant suffered significant cervical spine degenerative post-traumatic changes.

On October 17, 2008, claimant saw Dr. Fan with complaints of increased neck pain, right-sided low back pain, hip pain and knee pain. Dr. Fan prescribed Percocet for pain. Dr. Fan again examined claimant on November 12, 2008, February 13, 2009, March 30, 2009, and May 22, 2009. Each time Dr. Fan's records reflect that claimant returned for follow-up of chronic neck, back and hip pain.

Dr. Stein stated claimant had an ongoing, preexisting and substantial problem with his neck. On that basis, Dr. Stein opined that claimant had no impairment to the cervical spine from the work accidents because he was already in the *AMA Guides* DRE Category II impairment level. Dr. Stein could not document any additional damage to the neck from the work related injuries. Dr. Stein testified he did not believe there was any evidence to support a finding that claimant suffered any additional injury to the cervical spine that would require restrictions beyond what claimant had before his work injuries.

Dr. Estivo did not assign any impairment to claimant's cervical spine as a result of the accidents. He testified all claimant's cervical spine symptoms were consistent with preexisting chronic pain and degenerative disc disease to the cervical spine. Dr. Estivo did testify that there "could" have been an aggravation of the preexisting cervical spine condition. The term "could" cannot be interpreted to mean that the condition was more probably than not aggravated by the work injuries.

Dr. Prostig testified that as a result of the June 17, 2009, accident, claimant aggravated preexisting degenerative disc disease in his cervical spine. He rated claimant as having a 10 percent disability to the whole body for the cervical spine and an 18 percent disability to the left upper extremity, for a combined impairment of 20 percent of the whole body.

The Board finds the evidence provided by Dr. Stein and Dr. Estivo to be more compelling on the issue of whether the claimant suffered a cervical spine injury resulting from his work injuries. The record is clear that claimant was taking narcotics and involved in pain management for neck and other physical problems prior to the first accident. The claimant was treated for neck pain by Dr. Knackstedt and Dr. Hildebrand. Dr. Hildebrand ordered an MRI of the cervical spine in 2008 which showed degeneration and a bulging disc. A month before the June 17, 2009 injury, claimant was examined by Dr. Fan for chronic neck pain.

The Board finds claimant failed to meet his burden of proof to show that the preexisting neck condition was aggravated, accelerated or intensified by the work injury. As such, compensation for this injury will be limited to a scheduled injury at the level of the shoulder pursuant to K.S.A. 44-510d(a)(13) (Furse 2000).

2. Left Shoulder Impairment

The parties stipulated Dr. Lucas' assessment of a 5 percent impairment to the left upper extremity into the record. Dr. Prostic assessed an 18 percent left upper extremity impairment. Dr. Estivo rated claimant at 17 percent impairment of the left upper extremity. Dr. Stein opined claimant experienced a 20 percent impairment to the left upper extremity at the level of the shoulder. All of these opinions were placed into the record without objection or impeachment.

Based upon the fact that all of the opinions relating to permanent impairment to the left upper extremity were placed into the record without objection and that none of the opinions were challenged on cross-examination, the Board finds the opinions should be averaged to determine the extent of permanent impairment in this case and finds the claimant experiences a 15 percent permanent partial impairment of the left upper extremity at the level of the shoulder.

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The award in this docket only considered the right upper extremity. No separate claim was made by claimant for a cervical spine injury arising out of the December 20, 2009 injury. As such, the award will be limited to the right upper extremity at the level of the shoulder pursuant to K.S.A. 44-510d(a)(13).

The same group of physicians provided impairment ratings in this claim as in Docket No. 1,051,224. Dr. Lucas assessed a 5 percent impairment to the right upper extremity. Dr. Prostic assessed a 30 percent right upper extremity impairment. Dr. Estivo rated claimant at 7 percent impairment of the right upper extremity. Dr. Stein opined that claimant experienced an 8 percent impairment to the right upper extremity at the level of the shoulder.

Again, all of the opinions relating to permanent impairment to the right upper extremity were placed into the record without objection and none of the opinions were challenged on cross-examination. The Board finds the opinions should be averaged to determine the extent of permanent impairment in this case and finds claimant experiences a 12.5 percent permanent partial impairment of the right upper extremity at the level of the shoulder.

Interest Penalties Pursuant to 44-512b

A prehearing settlement conference was held on December 1, 2011. Respondent stipulated that claimant suffered injury by accident arising out of his employment on the dates alleged. However, as pointed out by the ALJ, there was no stipulation regarding the average weekly wage for both docketed cases until the regular hearing on January 19, 2012. On May 18, 2012, the respondent agreed to a stipulation allowing the admission of Dr. Lucas' rating into evidence "without further foundation or testimony" to be considered by the ALJ.

The ALJ awarded penalties commencing on the respondent's terminal date, May 23, 2012. The ALJ stated the reason for choosing that specific date was because respondent "retain[ed] the right to secure another opinion rating until its terminal date" ¹⁰ The Board disagrees. It is unrealistic to conclude that respondent would obtain another rating in the five days between the stipulation and the terminal date. The Board finds claimant is entitled to penalties commencing May 18, 2012, when the respondent agreed that its minimum exposure would be based on Dr. Lucas' rating of each shoulder.

The Board finds that the ALJ correctly calculated the interest penalty rate pursuant to K.S.A. 44-512b and K.S.A. 16-204. The interest penalty assessment shall be split equally and to each docketed claim.

CONCLUSION

Based upon a review of the record, the Board finds:

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1. Claimant did not meet his burden of showing he suffered an injury to his neck arising out of and in the course of his employment on June 17, 2009; and
2. claimant experiences a 15 percent permanent partial impairment of the left upper extremity at the level of the shoulder as a result of his injury on June 17, 2009.

¹⁰ ALJ Award (Aug. 17, 2012) at 11.

Docket No. 1,051,225

Claimant experiences a 12.5 percent permanent partial impairment of the right upper extremity at the level of the shoulder as a result of his injury on December 20, 2009.

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Claimant is entitled to penalties commencing May 18, 2012, at the per diem rate of \$.90. One half of the per diem amount is attributable to Docket No. 1,051,224 and one half of the amount is attributable to Docket No. 1,051,225.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Awards of Administrative Law Judge Bruce E. Moore dated August 17, 2012 in Docket Nos. 1,051,224 and 1,051,225, are modified to reflect an interest penalty commencement date of May 18, 2012. The Awards are affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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